

TAN AH TONG

v.

PERWIRA HABIB BANK (M) BHD.

HIGH COURT MALAYA, KUALA LUMPUR

LIM BENG CHOON J

[CIVIL NO. S7-93-83]

30 SEPTEMBER 1991

CIVIL PROCEDURE: *Striking out - Affidavit in support filed - No reliance on ground of no reasonable cause of action despite stated in application - Rules of the High Court 1980, O. 18 r. 19(1)(a), (2).*

CIVIL PROCEDURE: *Striking out - Vexatious and abuse of process - No right whatsoever as to relief prayed for - Statement of claim discloses no violation or prejudice of any right or interest.*

CONTRACT: *Specific performance - Plaintiff not a party to agreement.*

The plaintiff averred in his statement of claim that in consideration of him agreeing to charge his five pieces of land to the defendant, the defendant had agreed to (i) restructure the existing loan and overdraft facility of Asialand Housing Development Sdn. Bhd. (Asialand) with defendant to RM1,750,000 (the restructured loan); (ii) transfer and credit to Tan Realty Development Sdn. Bhd. (Tan Realty) existing loan amount a sum of RM400,000 from Asialand's restructured loan to liquidate Tan Realty's existing loan account; (iii) release and discharge to one Madam Lim Weow @ Lim Neu (Madam Lim Weow) her two pieces of land which were charged to defendant as security for Tan Realty's loan account.

The plaintiff had instituted this action for *inter alia* specific performance and damages as the defendant had wilfully refused and failed to abide by the said arrangement despite repeated demand.

Defendant applied to strike out the statement of claim and dismiss the action on grounds of no reasonable cause of action, scandalous, frivolous, vexatious or abuse of process of Court. In its affidavit in support, defendant denied existence of such arrangement and alleged that the charge created by the plaintiff had no relevance to the arrangement referred to in the statement of claim, that the plaintiff's cause of action if any was time-barred; that Madam Lim and Tan Realty had also instituted separate proceedings against the defendant based on similar facts.

The learned Senior Assistant Registrar had dismissed the defendants' application with costs. The defendant appealed.

Held:

[1] As the defendant had filed an affidavit in support, it is clear that it is not relying on ground (a) of RHC 1980, O. 18 r. 19(1) viz no reasonable cause of action notwithstanding such ground was set out in its application for if it were otherwise, it would not have filed an affidavit in support.

[2] As the plaintiff is not a party to the agreement entered into between the defendant and Asialand, Tan Realty and Madam Lim Weow and the charge agreement entered into between the defendant and Lim Weow, he had no right whatsoever to ask for the relief prayed for in his statement of claim.

- a** [3] The action of the plaintiff is highly misconceived and needless to say vexatious and an abuse of the process of the Court. The plaintiff's action is struck out with costs.

[Defendant's appeal allowed with costs. Order of SAR revoked. Plaintiff's statement of claim struck out.]

Case referred to:

- b** *Johnson v. Johnson [1884] Vol 33 WR 239 (cit)*

Legislation referred to:

Rules of the High Court 1980, O. 18 r. 19(1), (2)

Other source referred to:

Supreme Court Practice, Vol. 1, 1979 Edn., p. 314

- c** *For the plaintiff - Jaya Deva; M/s. Rajah, Lau & Associates*
For the defendant - L. Sabapathy; M/s. Skrine & Co.

JUDGMENT

Lim Beng Choon J:

- d** The plaintiff instituted this action on 28 April 1988 against the defendant. The averments of the plaintiff as set out in his statement of claim may be summarised as follows:

- e** On 6 December 1979, the defendant confirmed and agreed in writing (6 December 1979 agreement) with Asialand Housing Dypt. Sdn. Bhd. (Asialand) an earlier arrangement between the defendant, Asialand, one Tan Realty Dypt. Sdn. Bhd. (Tan Realty) and one Madam Lim Weow @ Lim Neu that the existing loan and overdraft facilities of Asialand with the defendant would be restructured to RM1,750,000 (the restructured loan). It was also agreed that the defendant would transfer and credit to Tan Realty's existing loan account a sum of RM400,000 from Asialand's restructured loan to liquidate Tan Realty's existing loan account. It was further agreed that the defendant would release and discharge to Madam Lim Weow her two pieces of land held under GM 156 and GM 16; for Lot Nos. 16398 and 16403 respectively both in the Mukim of Batu which was charged to the defendant as security for Tan Realty's loan amount in consideration of the plaintiff agreeing to charging his five pieces of land to the defendant as securities for Asialand's restructured loan and also as consideration for the said transfer of the said RM400,000 into Tan Realty's loan account as well as consideration for the release and discharge of Madam Lim Weow's properties. The plaintiff's properties were duly charged to the defendant *vide* Presentation No. 9657/77 Vol. 18 Folio 110, Presentation No. 9658/77 Vol. 18, Fol. 111 both dated 13 September 1977, Presentation No. 815/78 Vol. 5, Fol. 137, Presentation No. 816/78 Vol. 5 Fol. 138 both dated 23 March 1978, Presentation No. 284/80 Vol. 15 Fol. 40 Presentation No. 285/80 Fol. 41 both dated 21 January 1980. As at 31 January 1980 the sum including interest due and owing by Tan Realty to the defendant from Tan Realty's loan account was RM360,040.90 only. In breach of the said arrangement and agreed terms and conditions the defendant had wilfully failed and refused to credit the said sum of RM400,000 from Asialand's restructured loan account into Tan Realty's loan account
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- h** in liquidation thereof and also to discharge and release Madam Lim Weow's properties to the former but instead by a letter to Tan Realty the defendant required Tan Realty to (i) pay the defendant a sum of RM39,179.47 as interest due as at 30 September 1981 on Tan Realty's loan amount, which sum was paid by Tan Realty to the defendant on 5 September 1981 which was duly credited into the defendant's account and (ii) to execute a further charge over Tan Realty's land held under EMR. 2683 and 2684 for Lots 518 and 1014 both in the Mukim of
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Ulu Klang which was complied with by Tan Realty on 23 October 1981 by the execution and delivery of the further charge documents to the defendant's solicitors. Despite repeated demands, to date thereof the defendant had wilfully refused and failed to abide by the said arrangement and the agreed terms and conditions. The plaintiff, therefore, prayed for:

- (1) An order that the defendant do forthwith transfer the said sum of RM400,000 from the account of Asialand Housing Dvpt Sdn. Bhd. to the Tan Realty Dvpt Sdn. Bhd.'s account with the defendant in settlement of the loan;
- (2) A mandatory injunction that the defendant do deliver to the plaintiff/Tan Realty Dvpt Sdn. Bhd. or Madam Lim Weow @ Lim Neu the documents of title to the said property together with validly executed and registrable discharge of charge and attendant documents;
- (3) Damages;
- (4) Any other reliefs this Honourable Court deems just and fit to grant; and
- (5) Costs.

The plaintiff was granted an order in default of appearance on the part of the defendant on 30 September 1988 but the defendant subsequently succeeded in setting aside the said order. Thereupon the defendant filed in its memorandum of appearance on 25 January 1989 followed by its statement of defence on 2 February 1989. I do not propose to set out the averments in the statement of defence as these averments were repeated in the affidavit affirmed on behalf of the defendant to support its application to strike out the statement of claim of the plaintiff.

On 23 February 1989 the defendant made an application by way of-summons-in-chambers and pursuant to O. 18 r. 19 of the Rules of the High Court 1980 (RHC) and under the inherent jurisdiction of the Court for an order that the statement of claim be struck out and the action be dismissed with costs. The grounds of the application were that the plaintiff's statement of claim :

- (a) did not disclose any reasonable cause of action; and/or
- (b) was scandalous, frivolous or vexatious; and/or
- (c) was an abuse of the process of the Court.

One Tan Kwe Hee, the manager of the defendant, affirmed an affidavit on 21 February 1989 (encl. 18) in support of the application. It was firstly asserted in encl. 18 that:

- (a) there was no record in the defendant's files of such an arrangement or agreement as set out in the statement of claim;
- (b) the charges created by the plaintiff were not created pursuant to the purported arrangement or agreement referred to in the statement of claim.

It was secondly asserted that in any event:

- (a) the plaintiff had no cause of action in law against the defendant and that the plaintiff's claim against the defendant was misconceived;
- (b) the plaintiff's cause of action, if any, was barred by virtue of the provisions of the Limitation Act 1953;
- (c) the plaintiff was not entitled in law to the relief claimed.

a It was thirdly asserted that the plaintiff's wife Lim Weow @ Lim Neu and Tan Realty had also instituted separate proceedings against the defendant based on similar facts as those alleged in the statement of claim filed herein and the reliefs sought were similar to those prayed for in the proceedings filed herein. Annexed to enclosure 18 are:

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- (a) Exh. 'PHB1' which is a copy of the amended writ of summons and amended statement of claim in Civil Suit No. S6-23-195-88 filed in the High Court at Kuala Lumpur by Tan Realty Dvpt. Sdn. Bhd. against the defendant herein; and
 - (b) Exh. 'PHB2' which is a copy of the amended statement of claim filed by Lim Weow @ Lim Neu against the defendant herein in Civil Suit No. F353 of 1984 filed in the High Court at Kuala Lumpur.

c It was finally asserted that the amended statement of claim Exhibited in Exh. 'PHB2' was struck out by this Court on the 8 September 1988 on the application of the defendant herein. The plaintiff herein had filed a notice of appeal which had been fixed for hearing on 4 April 1989.

d In response, the plaintiff affirmed an affidavit-in-reply on 24 May 1990 (encl. 27) in which he firstly produced the related documents which he annexed to enclosure 27 as Exhs 'A' to 'F' to show that the defendant had (as claimed by the plaintiff) agreed to what were averred in the statement of claim. In particular the plaintiff produced and marked as Exh. 'C' annexed to encl. 27 a copy of the defendant's solicitor's letter dated 1 July 1989 which, he claimed, confirmed the creation of the charges over the properties in question. He secondly asserted that:

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- (a) the defendant had reached the agreement breached between the parties especially when the plaintiff had acted to his detriment hence not only the plaintiff had a good cause of action in law for a remedy but also in equity.
 - (b) it was obvious in the light of the defendant's letter dated 28 July 1982 that the plaintiff's action was not barred at all.

f He finally asserted that the earlier proceedings instituted by Tan Realty and Lim Weow had no bearing whatsoever to present case as the action here was independent.

f The application of the defendant to strike out the statement of claim of the plaintiff was heard by the Senior Assistant Registrar on 30 May 1990 and on 8 June 1990 she delivered her judgment dismissing the application of the defendant with costs. The defendant thereafter filed a notice of appeal against the Senior Assistant Registrar's decision to this Court on 9 June 1990.

g On 27 September 1990 the plaintiff filed a further affidavit affirmed on 27 September (enclosure 30) enclosing a purported affidavit affirmed by one Mazlan bin Khamis (Mazlan) the Credit Controller of the defendant Bank affirmed on 28 August 1987 which was annexed to the further affidavit as Exh. 'I'. The said affidavit of Mazlan was apparently used in proceedings instituted by Lim Weow in Civil Suit No. F353 of 1984 against the defendant herein. The purpose of submitting the affidavit of Mazlan is obvious - it is intended to show and it does show that the plaintiff's allegation of the arrangement and agreement made between the defendant on the one part and Tan Realty and Lim Weow on the other part is true.

i In dealing with the application of the defendant to strike out the statement of claim it is appropriate to state that although the defendant had set out these grounds in support of its request to strike out the statement of claim nevertheless as the defendant had filed in an affidavit in support it is clear that it is not relying on ground (a) of Order 18 Rule 19 (1) of RHC namely that the statement of claim does not disclose any reasonable cause of action

for if it were otherwise it would not have filed an affidavit in support of its application to strike out the statement of claim for it should know or at least its legal adviser would have advised it that to strike out a statement of claim pursuant to ground (a) of O. 18 r. 19(1) no affidavit evidence can be adduced (see subrule (2) of r. 19 O. 18 of RHC). I shall therefore proceed to consider whether the action is vexatious and an abuse of the process of the Court.

Considering the statement of claim as a whole it is clear to me that first the plaintiff is in effect trying to ask this Court for a remedy which is in the nature of specific performance of an agreement dated 6 December 1979 entered into by the defendant on the one part and Asialand, Tan Realty and Lim Weow on the other part. Second the plaintiff is also trying to ask for a similar remedy for the performance of the agreement of the same date entered into by the defendant on the one part and Lim Weow on the other part whereby the defendant purported to agree to discharge the charge over the lands belonging to Lim Weow. This proposition is supported by the reliefs prayed for by the plaintiff in his statement of claim of which I have reproduced in the early part of this judgment. Bearing in mind that the plaintiff is not a party to the agreement entered into between the defendant and Asialand, Tan Realty and Lim Weow and the charge agreement entered between the defendant and Lim Weow, he had no right whatsoever to ask for the relief which as I have said is in the nature of specific performance. It has been stated in the *Supreme Court Practice* Vol. 1979 Edn. at p. 314 para. 18/19/5A that:

... if a relief he asked on a ground which is no ground for such relief, the statement of claim will be struck out and the action dismissed.

The case of *Johnson v Johnson* [1884] Vol. 33 WR at p. 239 was cited as an authority for this proposition. There Bagullay LJ said:

This appeal is, in my opinion, one that ought not to have been brought... However extraordinary and improbable the plaintiff's grounds of action may seem, we are bound to assume them to be true, as formerly on demurrer. Pearson J. decided that these grounds are wholly insufficient to enable a husband to get rid of a settlement executed by him on his marriage. The marriage was the sole consideration for the settlement, and a consideration which could not be returned if the settlement were set aside. In my view the decision of Pearson J. was perfectly right.

Likewise in the present case the plaintiff tried to persuade this Court that by reason of the agreement of 6 December 1979, the loan agreement of Tan Realty by which a loan was granted to it by the defendant in consideration of the charge created by Lim Weow on her own lands as security for the repayment of the loan should be extinguished where as I have said earlier the plaintiff was neither a party to the agreement of 6 December 1979 or the loan agreement of Tan Realty or the charge instrument in respect of Lim Weow's lands. I have no doubt the ground relied on by the plaintiff is no ground to sustain the reliefs prayed for in his statement of claim. The proper parties to ask for such reliefs are Tan Realty and/or Lim Weow and indeed they have already done so in the civil suits which I have mentioned earlier. This action of the plaintiff is nothing more than a mere duplicity of the two earlier actions instituted by Tan Realty and Lim Weow respectively. Furthermore nowhere in the statement of claim nor the affidavit filed by the plaintiff was it stated that any of his right or interest has been violated or even prejudiced. Indeed upon a careful scrutiny of para. 4 of the statement of claim it is to be noted that most if not all of the properties of the plaintiff were charged to the defendant long before the agreement of 6 December 1979. It is therefore incredible for the plaintiff to link the charges created by him in respect of his properties to whatever arrangement or agreement entered into between the defendant and Tan Realty and

a Lim Weow. This pleading of the plaintiff goes only to support the assertion made by Tan Kwe Hee in his affidavit enclosure 18 that “the charges created by the plaintiff were not created pursuant to the purported arrangement or agreement referred to in the statement of claim”.

b For the reasons as stated above I am satisfied that the action of the plaintiff is highly misconceived and needless to say vexatious and an abuse of the process of the Court. Having arrived at this conclusion I need not consider the question of limitation. The application of the defendant to strike out the writ and statement of claim is allowed and the order made by the Senior Assistant Registrar on 8 June 1990 dismissing the application of the defendant is revoked. I further direct that the plaintiff do pay the defendant costs of the proceedings.

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Also found at [1992] 2 CLJ 885

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